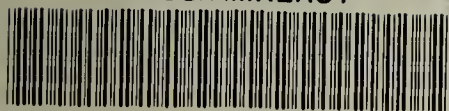


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**EMPLOYMENT RIGHTS
OF INDIVIDUALS WITH DISABILITIES**

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EMPLOYMENT RIGHTS OF INDIVIDUALS WITH DISABILITIES

QUESTION 1:

What are the federal (United States) and state (Massachusetts) laws which apply to a disabled person's right not to be discriminated against in employment?

Answer: The Americans With Disabilities Act of 1990 ("ADA") is the federal law which prohibits discrimination against persons with disabilities. The Massachusetts employment discrimination statute is Chapter 151B of the Massachusetts General Laws.

The ADA and Chapter 151B are essentially the same in their prohibition of employment discrimination against individuals with disabilities. Chapter 151B, however, covers some private employers (see Question 2) and certain medical conditions not covered by the ADA. In addition, the laws are enforced somewhat differently (see Questions 14 through 17.)

QUESTION 2:

Which employers are covered by the ADA and Chapter 151B?

Answer: Title I of the ADA covers the employment practices of private employers. Title II covers the employment practices of public employers (all units of state and local government).

Chapter 151B also covers the employment practices of private and public employers. With regard to private employers, it provides somewhat broader coverage in that it applies to employers with 6 or more employees, while the ADA only applies to employers with 25 or more employees (15 or more after July 26, 1994). (Federal employees continue to be covered by Section 501 of the Rehabilitation Act of 1973.)

QUESTION 3:

How do these laws protect employment rights?

Answer: Both the ADA and Chapter 151B provide that an employer may not discriminate against a "qualified individual with a disability" ("qualified handicapped person" under Chapter 151B), which is defined as a person who can perform the "essential functions" of a job, with or without a "reasonable accommodation." An employer must provide reasonable accommodations with regard to the known physical and mental limitations of a qualified applicant or employee with a "disability", unless the employer can demonstrate that providing the accommodation would impose an "undue hardship." Both laws define these terms in essentially the same way (see Questions 5 - 10).

QUESTION 4:

How do these laws define "individual with a disability"?

Answer: The three part definition covers individuals:

- 1) with a mental or physical impairment that limits one or more major life functions; or
- 2) who have a history of such an impairment; or
- 3) who are perceived (even if erroneously) as having such an impairment.

Both laws cover infection with HIV, even if one is asymptomatic, and AIDS.

QUESTION 5:

Who fits the description of a "qualified individual with a disability"?

Answer: This term refers to those individuals with a disability who: 1) satisfy the general skill, experience, education and other job-related requirements, and 2) can perform the essential functions of the job, with or without reasonable accommodation.

QUESTION 6:

What are "essential job functions"?

Answer: Essential functions are narrowly defined to include fundamental, as opposed to marginal, job duties. A job function is more likely to be "essential" if it requires special expertise, if a large amount of time is spent on that function, and/or if that function was listed in the written job description prepared before the employer advertised for or interviewed job applicants.

QUESTION 7:

What is meant by "reasonable accommodation"?

Answer: "Reasonable accommodation" refers to an employment-related modification that an employer must make in order to ensure equal opportunity for an individual with a disability to 1) apply for and test for a job, 2) perform essential functions, and 3) receive the same benefits and privileges as other employees. The employer is only required to provide a reasonable accommodation to known disabilities (i.e., the disability is obvious or the applicant/employee informs the employer of the disability).

Although each case must be evaluated individually, some common examples of accommodations include: job restructuring (to eliminate non-essential tasks), changes to job schedules, reassignments to vacant positions, physical alteration to the existing facilities, provision of qualified readers or interpreters, and modification of examinations and/or training materials.

QUESTION 8:

If an employer believes that it is unable to provide a requested accommodation, what can it do?

Answer: If an employer can demonstrate that the requested accommodation imposes an "undue hardship" on its operations (financial or administrative), it would not be required to provide the requested accommodation. Where a requested accommodation is considered an undue hardship due to its excessive costs,

an employer may not prohibit an applicant or employee from providing this accommodation to the extent that he/she can fund those costs that are considered excessive. (Thus, an applicant or employee has the right to know the reason(s) a requested accommodation is considered an undue hardship.)

QUESTION 9:

What criteria are used to determine whether an accommodation is an "undue hardship"?

Answer: An accommodation may prove to be an undue hardship when its implementation would result in "significant difficulty or expense" to the employer. Factors to be considered in making this determination include:

- 1) the nature and net cost of the accommodation itself;
- 2) the impact of the accommodation on the operation of the facility involved, taking into account the facility's overall resources and the number of its employees;
- 3) the manner in which the employer's business operates, taking into account its size and financial resources.

In asserting that an accommodation is an undue hardship, an employer must rely upon actual, not hypothetical, costs and burdens.

QUESTION 10:

Are there any additional circumstances which would justify an employer's refusal to hire a qualified individual with a disability?

Answer: An employer may refuse to hire a qualified individual with a disability if the applicant presents a significant risk of substantial harm to him/herself, to other employees, or to the public, that cannot be eliminated or reduced by reasonable accommodation. In making this judgment, an employer must make an individualized assessment of the person's present ability to perform the job's essential functions safely, based upon reasonable medical opinion and/or the best available objective evidence.



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QUESTION 11:

Is an employer prohibited from asking a job applicant questions related to the existence and nature of a disability?

Answer: An employer is prohibited from inquiring whether an applicant or employee is disabled, or the extent to which he/she is disabled. For example, an employer may not ask an applicant to list his/her disabilities, how he/she became disabled, for a prognosis, or how often he/she might require leave due to a disability. An employer may ask whether the applicant is able to perform job-related functions, but not questions intended to determine whether the person is disabled. Thus, an employer may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, he/she will be able to perform job-related functions, but cannot ask the person to list "the medications you take" or anything pertaining to an applicant's worker's compensation history. For example, an employer may be permitted to ask an applicant whether he/she can lift a 50 pound bag four times per shift, but not whether he/she has a bad back.

QUESTION 12:

Is it permissible for employers to require applicants to take medical exams as a condition to being considered for the job?

Answer: Prior to making an offer of employment, an employer is prohibited from requiring an applicant to take a medical exam.

However, once an offer of employment has been made, an employer may condition the offer on the passing of a medical exam, but only: 1) if all entering employees in the same job category, regardless of the presence of a disability, are required to pass the same exam, or 2) if necessary to develop a reasonable accommodation. Only exam findings related to one's ability to perform essential job functions, with or without reasonable accommodation, may be used in making employment decisions. In addition, medical information collected must be kept confidential, and made available only to supervisors, first aid and safety personnel, and certain government officials.

QUESTION 13:

What limitations are there on employers in the establishment of qualification standards, tests or other criteria with regard to the hiring and placement process?

Answer: Employment criteria and tests which tend to screen out or identify individuals with disabilities are prohibited unless they are designed to measure one's ability to perform an essential job function and are consistent with business necessity. Thus, job descriptions should clearly list the necessary qualifications and essential functions of the job. In addition, an employer is required to select and administer employment tests that measure an individual's job-related abilities, and not defects in sensory, manual or speaking skills where those skills are not necessary to perform an essential job function. For example, proper exam accommodations for an applicant with a hearing-impairment might include extra time, a written exam, or an interpreter.

QUESTION 14:

How does an individual seek agency enforcement of employment rights granted under the ADA?

Answer: An individual seeking agency enforcement of employment rights under the ADA must file a complaint with either:

1) The Massachusetts Commission Against Discrimination ("MCAD") -- the authorized state enforcement agency -- within six months of the incident (or the last of a series of incidents) which gave rise to the complaint; or

2) The Equal Employment Opportunity Commission ("EEOC") -- the authorized federal enforcement agency -- within 300 days of the incident (or the last of a series of incidents) which gave rise to the complaint, or within 30 days after the MCAD proceedings have terminated, whichever is shorter.

In either case, the complaint should include a clear and concise statement of the facts, including the dates of the unlawful practices and the number of the employees. After the complaint is investigated and evaluated, the respective agency will attempt to eliminate any unlawful employment practices through negotiation and formal agreements.

QUESTION 15:

At what point may an individual file a private lawsuit via the ADA?

Answer: An individual seeking to file a private lawsuit pursuant to the ADA against a private employer must first file a complaint with either the EEOC or MCAD, subject to the time limitations set out above (see Question 14). With regard to ADA lawsuits against public employers, it is not clear whether agency filing is first required before a lawsuit may be filed, but it is certainly permitted.

QUESTION 16:

How does an individual seek redress for violation of employment rights granted under Chapter 151B?

Answer: An individual who believes that an employer has violated his/her rights granted under Chapter 151B and seeks agency enforcement of those rights, must file a complaint with MCAD. The procedure (including time limitations) for seeking relief through agency enforcement is essentially the same as when an ADA complaint is filed with MCAD (see Question 14).

An individual who wishes to file a private lawsuit against a private or public employer must first file a complaint with MCAD.

QUESTION 17:

What type of relief is available under the ADA and Chapter 151B?

Answer: The ADA and Chapter 151B generally allow for the same types of remedies. These would include, where appropriate, reinstatement, compensatory damages for front and back pay, punitive damages, and attorneys' fees.

